

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

8 AVERY SIMMONS, an individual,

9 Plaintiff,

10 v.

11 SAFEWAY, INC., d/b/a HAGGEN FOOD
AND PHARMACY, a Delaware
12 corporation,

13 Defendant.

CASE NO. 18-5522 RJB

ORDER ON MOTION FOR
SUMMARY JUDGMENT

14 THIS MATTER comes before the Court on Defendant Safeway, Inc., d/b/a Haggen Food
15 and Pharmacy's ("Haggen" or "Defendant") Motion for Summary Judgment. Dkt. 49. The
16 Court has considered the pleadings filed regarding the motion and the remaining file.

17 On May 14, 2018, Plaintiff Avery Simmons filed this employment discrimination case in
18 Thurston County, Washington, Superior Court, in connection with her employment in the deli at
19 Haggen's Olympia, Washington store. Dkt. 1-2. Haggen moves for summary judgment on all
20 claims. Dkt. 49. For the reasons provided below, Haggen's motion (Dkt. 49) should be granted.

21 **I. BACKGROUND FACTS AND PROCEDURAL HISTORY**

22 **A. BACKGROUND FACTS**

23 Haggen hired the Plaintiff as a deli worker on February 16, 2017. Dkt. 12, at 2. The Plaintiff
24 received employee orientation and a handbook, which contained Haggen's policies regarding

1 harassment, discrimination, retaliation, mandatory immediate worker injury reporting, and
2 attendance requirements (which provided that during a six month period excessive absenteeism –
3 four or more instances – will be subject to corrective action). Dkt. 50-1, at 6-10. The Plaintiff
4 was also a member of a union, and was aware she could, but did not, file complaints with her
5 union. *Id.*, at 10-11.

6 On August 24, 2017, the Plaintiff splashed water in her eye while cleaning up after 9:00 p.m.
7 Dkt. 50-1, at 13. The following day, the eye appeared swollen, and the Plaintiff was concerned
8 she had an infection. *Id.*, at 14. She reported the incident to Haggen on August 26, 2017. Dkt.
9 50-1, at 15-17. The Plaintiff filled out a formal incident form on August 27, 2017. *Id.* On
10 September 3, 2017, she received a write-up by Lillian Hett, a supervisor, indicating that her
11 injury resulted from careless work habits. *Id.*, at 19. Plaintiff also filed a Self-Insurer Accident
12 Report form and a worker’s compensation claim on September 3, 2017. Dkt. 50-1, at 77. She
13 received a Personnel Action Notice, dated September 4, 2017, for failing to report the injury
14 right away. Dkt. 50-1, at 84. The Personnel Action Notice is a form, which includes a small
15 type-written portion which reads, “additional or continued violations will subject you to further
16 corrective action up to and including discharge.” Dkt. 50-1, at 84.

17 Around the end of August 2017, Andy Shaffer began working in the deli with the Plaintiff.
18 Dkt. 50-1, at 21. The Plaintiff felt uncomfortable around Mr. Shaffer – she asserts that he stared
19 at her and would stand one to two feet away (too close for her comfort). Dkt. 50-1, at 22.
20 Although she never told anyone at Haggen, the Plaintiff felt the way he stared was like he “was
21 undressing [her] with his eyes.” Dkt. 59-4, at 41.

22 On October 3, 2017, the Plaintiff accepted a job with Hobby Lobby. Dkt. 61-1, at 4.
23
24

1 On October 16, 2017, around 9:00 a.m. or 10:00 a.m., the Plaintiff reported to Haggen
2 managers Connie West and Lillian Hett that Mr. Shaffer was staring at her, following her around
3 (into the dish room and cooler), and that he made her feel uncomfortable and unsafe. Dkt. 50-1,
4 at 29-30. According to the Plaintiff, Ms. West said “That’s just how he is, he stares at me too.”
5 Dkt. 50-1, at 30. The Plaintiff asserts that Ms. Hett said, “We’ll watch him.” Dkt. 50-1, at 30-
6 31. The Plaintiff wanted them to talk with Mr. Shaffer immediately about it. Dkt. 50-1, at 31.

7 Around lunch time on October 16, the Plaintiff asserts that Mr. Shaffer took his meal break at
8 the same time she did even though meal breaks were supposed to be staggered so that only one
9 deli employee was on break at a time. Dkt. 58, at 2.

10 That same day, October 16, around 1:30 p.m., the Plaintiff maintains that she was standing in
11 a small hallway looking at the schedule with another employee, CJ (the employee’s full name is
12 not in the record). Dkt. 50-1, 24. The schedule and temperature log, which the employees used
13 to keep track of the temperatures of various deli products to ensure they comply with health
14 codes, was kept next to the schedule. Dkt. 50-1, at 24. According to the Plaintiff, Mr. Shaffer
15 “takes his hand and forearm and cups his hand and touches [her] lower back, and wraps it around
16 [her] waist, and then reaches for the [temperature] log” for 30 seconds. Dkt. 50-1, at 24-25. She
17 does not know if CJ, the other employee who was present, saw it. *Id.* The Plaintiff maintains
18 that Mr. Shaffer did not need the temperature log for another 30 minutes. *Id.* She asserts that
19 she ran away crying to the dish room. Dkt. 58, at 2. The Plaintiff did not report to anyone at
20 Haggen that Mr. Shaffer touched her until October 23, 2017. Dkt. 59-4, at 28.

21 After learning that Mr. Shaffer was making the Plaintiff uncomfortable with his staring, Ms.
22 Hett counseled Mr. Shaffer that day (October 16) about how he looked at people in the store;
23 specifically, that he made co-workers uncomfortable when he stared at them. Dkts. 53, at 2 and
24

1 54 at 2. Mr. Shaffer maintains that no one told him they felt uncomfortable, that he felt badly,
2 and was only trying to learn his job by watching others. Dkt. 53, at 2. He denies touching the
3 Plaintiff. *Id.*

4 Four days later, on the morning of October 20, 2017, the Plaintiff received two Personnel
5 Action Notices, or “documented verbal warnings” given to her by Jennifer Barker, another
6 manager. Dkts. 50-1, at 37 and 52, at 2. One was for her failure to turn on the soup pots on
7 October 7 and October 15; it was signed by Ms. Barker and Ms. Hett. *Id.* The Plaintiff thought
8 she turned the pots on. Dkt. 50-1, at 37. However, she was the only employee that turned the
9 pots on (Dkt. 50-1, at 38) and she acknowledges that the daily temperature logs indicated that she
10 failed to do it on those days (Dkt. 50-1, at 48). The second Personnel Action Notice or
11 “documented verbal warning” was for excessive absenteeism. Dkt. 52, at 2. The Plaintiff
12 acknowledges that she was absent from work on July 30, August 12, August 26 (for her eye
13 injury), September 25, and October 8. Dkt. 50-1, at 38-39 and 49. Ms. Barker states that she
14 alone decided to issue the Personnel Action Notices and had no knowledge of the Plaintiff’s
15 complaint regarding Mr. Shaffer. Dkt. 52, at 3.

16 On Friday, October 20, 2017 Elizabeth Parkes, in-house counsel for Haggen, was ill, but was
17 at work. Dkt. 50-2, at 4. The Plaintiff called and told the Ms. Parkes’s assistant (the person who
18 answered the phone) that she needed to talk to someone about “sexual harassment.” Dkt. 59-4,
19 at 35. Ms. Parkes was on the phone when her assistant brought her a note card about the phone
20 call from the Plaintiff about being sexually harassed. Dkt. 50-2, at 4-5. Ms. Parkes states that
21 she called the store, spoke to Ms. Hett, and began her investigation into the Plaintiff’s allegations
22 on October 20, 2017. Dkt. 50-2, at 5. After making some notes about the conversation, she then
23
24

1 went home early because she was sick. Dkt. 50-2, at 6. Ms. Parkes was aware that the Plaintiff
2 and Mr. Shaffer were not scheduled to work together again until October 24, 2017. Dkt. 51, at 3.

3 After her conversation with Ms. Parkes, Ms. Hett again coached Mr. Shaffer about his staring
4 and Haggen's policies, even though he had not worked with the Plaintiff since her October 16th
5 complaint. Dkt. 54, at 2.

6 On Monday, October 23, 2017, at the beginning of her shift, the Plaintiff states that she
7 talked with Ms. Barker, a manager, about Mr. Shaffer. Dkt. 50-1 at 32. The Plaintiff maintains
8 that she reported to Ms. Barker that Mr. Shaffer had touched her, was staring at her, and she "did
9 not feel safe to close with him at night." Dkt. 50-1, at 32. The Plaintiff did not tell Ms. Barker
10 that she was not going to come to work the next day – October 24, 2017. Dkt. 50-1, at 50-51.

11 The Plaintiff asserts that, at that point, no one followed up with her about her complaint
12 regarding Mr. Shaffer. Dkt. 50-1, at 32.

13 On October 23, 2017, the Plaintiff states she again contacted Haggen's legal team. Dkt. 50-
14 1, at 32. She maintains that she was asked to call back later because Ms. Parkes, who was
15 investigating her complaints, was out sick. Dkt. 50-1, at 40. The Plaintiff told the assistant who
16 answered the phone, that in addition to the staring, Mr. Shaffer touched her waist. Dkt. 59-7.

17 Even though she was at home sick, Ms. Parkes states that she tried calling the Plaintiff twice
18 on October 23, 2017. Dkt. 50-2, at 8. She left a message after an automated greeting. *Id.* Ms.
19 Parkes had the wrong number; she dialed a phone number one digit off the Plaintiff's number.
20 Dkt. 51, at 3.

21 That same day, on October 23, 2017, Ms. Parkes called Ms. Hett and emailed the store. Dkt.
22 50-2, at 13. Ms. Parkes told Ms. Hett to counsel Mr. Shaffer and to "get a detailed written
23 statement" from the Plaintiff. *Id.* and Dkt. 51, at 4. The email, dated October 23, 2017, marked
24

1 “high importance,” and sent to the store manager Darren Mayes and Lillian Hett, provides that
2 Ms. Parkes tried calling the Plaintiff. Dkt. 50-2, at 15 and 32. It further provides that “[i]f she
3 doesn’t call me back someone will need to get a detailed written statement from her when she
4 clocks on tomorrow.” *Id.*

5 The Plaintiff was scheduled to work with Mr. Schaffer on October 24, 2017. Dkt. 50-1, at
6 41. She did not go to work on October 24th. Dkt. 50-1, at 41. She states that she communicated
7 to Haggen that she was not working by “not show[ing] up.” Dkt. 50-1, at 50-51. She did not call
8 them either. Dkt. 50-1, at 51. She states that she had a panic attack that day and went to the
9 hospital for suicidal thoughts. Dkt. 58, at 3.

10 On October 25, 2017, the Plaintiff came into the deli and told manager Ms. West that she
11 “quit.” Dkt. 50-1, at 52. According to the Plaintiff, Ms. West responded with “it wasn’t even
12 that bad, I thought you were tougher than that, he didn’t even show up last night.” Dkt. 50-1, at
13 52. The Plaintiff states that she “quit, so [she didn’t] think [she] was discharged constructively.”
14 Dkt. 50-1, at 54.

15 On November 7, 2017, the Plaintiff spoke with an in-house attorney for Haggen, Ms. Parkes.
16 Dkt. 50-2, at 27. Ms. Parkes told the Plaintiff about the counseling that Mr. Shaffer received
17 regarding her complaints. Dkt. 50-2, at 28.

18 On November 7, 2017, Mr. Schaffer was again counseled by Ms. Barker and Mr. Mayes.
19 Dkts. 50-2, at 39 and 53, at 2.

20 The Plaintiff filed an Equal Employment Opportunity Commission charge on April 13, 2018,
21 which provided, in part:

22 I was constructively discharged on or about October 24, 2017. On or around
23 October 16, 2017, I was sexually harassed by co-worker, Andrew LNU, in the
24 form of unwanted touching and sexual gestures. I reported the harassment to
management, but no action was taken. Lastly, due to all of the harassment I was

1 subjected to by Andrew, I felt that I had no other choice, but to resign my
2 employment. I believe that I have been subjected to sexual harassment and
3 constructively discharged because of my sex (female) in violation of Title VII of
4 the Civil Rights Act of 1964, as amended.

5 Dkt. 50-3, at 2. The charge, which is on a form, indicated that she was discriminated against on
6 the basis of sex (by checking a box) but did not indicate retaliation was a part of the charge (the
7 retaliation box was not checked). *Id.* She received her Notice of Right to Sue on April 17, 2018.

8 Dkt. 50-3, at 3. She filed an updated charge with the EEOC, which asserted the same grounds
9 (Dkt. 50-3, at 5) as the April 13, 2018 charge and received her second Notice of Right to Sue on
10 August 16, 2018 (Dkt. 50-3, at 6).

11 **B. PROCEDURAL HISTORY**

12 The Plaintiff asserts claims against Haggen for hostile work environment and retaliation
13 under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, *et. seq.* (“Title VII”), and the
14 Washington Law Against Discrimination, RCW 49.60, *et. seq.* (“WLAD”). Dkt. 12, at 3-4. She
15 also makes claims wrongful termination and claim suppression under Washington common law.
16 *Id.* The Plaintiff seeks injunctive relief, damages, attorneys’ fees, and costs. *Id.*

17 The trial is set to begin on September 30, 2019. Dkt. 18.

18 **II. DISCUSSION**

19 **A. SUMMARY JUDGMENT STANDARD**

20 Summary judgment is proper only if the pleadings, the discovery and disclosure materials
21 on file, and any affidavits show that there is no genuine issue as to any material fact and that the
22 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c). The moving party is
23 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient
24 showing on an essential element of a claim in the case on which the nonmoving party has the
burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue

1 of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find
2 for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586
3 (1986)(nonmoving party must present specific, significant probative evidence, not simply “some
4 metaphysical doubt.”). *See also* Fed. R. Civ. P. 56 (d). Conversely, a genuine dispute over a
5 material fact exists if there is sufficient evidence supporting the claimed factual dispute,
6 requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty*
7 *Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors*
8 *Association*, 809 F.2d 626, 630 (9th Cir. 1987).

9 The determination of the existence of a material fact is often a close question. The court
10 must consider the substantive evidentiary burden that the nonmoving party must meet at trial –
11 e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect.*
12 *Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor
13 of the nonmoving party only when the facts specifically attested by that party contradict facts
14 specifically attested by the moving party. The nonmoving party may not merely state that it will
15 discredit the moving party’s evidence at trial, in the hopes that evidence can be developed at trial
16 to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*).
17 Conclusory, non-specific statements in affidavits are not sufficient, and “missing facts” will not
18 be “presumed.” *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

19 **B. HOSTILE WORK ENVIRONMENT CLAIM UNDER TITLE VII AND WLAD**

20 Both Title VII of the Civil Rights Act of 1964 and the WLAD prohibit employer
21 discrimination based on sex or race. 42 U.S.C. § 2000e-2(a)(1); RCW 49.60.180(3). To
22 establish a prima facie hostile work environment claim case under Title VII and the WLAD, a
23 plaintiff must show that, because of their race or sex, they were (1) subjected to unwelcome
24

1 conduct (2) “that was sufficiently severe or pervasive to alter the conditions of [their]
2 employment and create an abusive working environment” and (3) their employer itself is “liable
3 for the harassment that caused the hostile environment to exist.” *Campbell v. Hawaii Dep’t. of*
4 *Educ.*, 892 F.3d 1005, 1007 (9th Cir. 2018)(*internal quotation marks and citations omitted*);
5 *Loeffelholz v. Univ. of Washington*, 175 Wash. 2d 264, 274 n.1 and 275 (2012)(*noting that*
6 *Washington courts have traditionally found federal case law persuasive and use the same prima*
7 *facie case*). “The working environment must both subjectively and objectively be perceived as
8 abusive, and the objective analysis is done from the perspective of a reasonable woman.” *Fuller*
9 *v. Idaho Dep’t of Corr.*, 865 F.3d 1154, 1161 (9th Cir. 2017).

10 The Plaintiff’s claim for hostile work environment under federal and state law should be
11 dismissed because she has failed to make an adequate showing as to the second and third element
12 of these claims.

13 1. Unwelcome Conduct

14 For the purposes of this motion, Haggen does not dispute that the Plaintiff was subjected to
15 unwelcome conduct.

16 2. Severe or Pervasive Conduct that Alters Conditions of Employment and
17 Causes Hostile Environment

18 In regard to the second element, all circumstances are considered, “with a particular focus
19 on issues such as the frequency and severity of the conduct, whether the conduct was physically
20 threatening or humiliating, and the extent to which it unreasonably interfered with [the
21 plaintiff’s] work performance.” *Campbell*, at 1007. “Simple teasing, offhand comments, and
22 isolated incidents (unless extremely serious) are not sufficient to create an actionable claim under
23 Title VII, but the harassment need not be so severe as to cause diagnosed psychological injury.”
24

1 *Reynaga v. Roseburg Forest Products*, 847 F.3d 678, 687 (9th Cir. 2017)(internal quotation
2 marks and citations omitted).

3 Even viewing the facts in a light most favorable to the Plaintiff, she has failed to point to
4 sufficient issues of fact that show that Mr. Shaffer’s conduct was severe or pervasive enough to
5 alter her conditions of employment from the perspective of a reasonable woman. His conduct
6 was not “physically threatening or humiliating” and she makes no showing that it would
7 unreasonably interfere with a reasonable woman’s work performance. The Plaintiff has failed to
8 point to sufficient facts to demonstrate that Mr. Shaffer’s conduct, that of staring and following
9 people around the deli was objectively pervasive or severe enough to satisfy this element.
10 Further, even crediting the Plaintiff’s testimony, that Mr. Shaffer put his arm around her waist to
11 reach for the temperature log, was an isolated incident which was not “severe or pervasive”
12 enough to cause a hostile environment. *See Reynaga*, at 687. This element is not met.

13 3. Conduct Imputed to the Employer

14 As to the third element, “[a]n employer may be held liable for creating a hostile work
15 environment either vicariously (i.e., through the acts of a supervisor) or through negligence (i.e.,
16 failing to correct or prevent discriminatory conduct by an employee).” *Fuller*, at 1164. In the
17 absence of grounds for imposing vicarious liability, as here, “an employer is liable for a hostile
18 work environment created by a plaintiff’s co-worker if the employer knew, or should have
19 known, about the harassment and failed to take prompt and effective remedial action.” *Reynaga*
20 *v. Roseburg Forest Products*, 847 F.3d 678, 689 (9th Cir. 2017)(internal quotation marks and
21 citations omitted). “Remedial action must include some form of disciplinary measures of which
22 must be proportionate to the seriousness of the offense.” *Id.*

1 The Plaintiff fails to point to sufficient issues of fact to show that Mr. Shaffer's conduct
2 should be imputed to Haggen. The same day she made her supervisors aware of Mr. Shaffer's
3 conduct and asked them to talk to him about it, October 16, 2017, Ms. Hett counseled Mr.
4 Shaffer in keeping with the Plaintiff's request. At that point, the Plaintiff did not tell her
5 supervisors that Mr. Shaffer followed her around or that he touched her (because he had not done
6 that yet). The remedial action of counseling him for the staring was "proportionate to the
7 seriousness of the offense." *Reynaga*, at 689. Further, after she complained to the legal team,
8 Ms. Parkes began the investigation the same day (Friday October 20, 2017), and knew that the
9 Plaintiff and Mr. Shaffer were not scheduled to work together again until Tuesday, October 24th.
10 On Monday, October 23, 2017, after a conversation with Ms. Parkes, Ms. Hett again coached
11 Mr. Shaffer about his conduct and Haggen's policies, even though he had not worked with the
12 Plaintiff since her October 16th complaint. The Plaintiff did not work with Mr. Shaffer as
13 scheduled on October 24, 2017. There is no showing that Haggen's remedial action was not
14 reasonable nor reasonably calculated to stop Mr. Shaffer's conduct. This element is not met.

15 C. RETALIATION CLAIM UNDER TITLE VII AND WLAD

16 Haggen moves for dismissal of the retaliation claims, arguing that the Plaintiff failed to
17 exhaust her administrative remedies with the EEOC because she did not indicate that she was
18 asserting retaliation claims in her charge. It further moves to dismiss the retaliation claims,
19 arguing that the Plaintiff cannot point to sufficient evidence, if believed, to support the claim.

20 Failure to Exhaust Retaliation Claims with the EEOC

21 "As a precondition to the commencement of a Title VII action in court, a complainant
22 must first file a charge with the [EEOC]." *Fort Bend Cty., Texas v. Davis*, 139 S. Ct. 1843, 1846
23 (2019)(citing § 2000e-5(e)(1), (f)(1)). "Title VII's charge-filing requirement is a processing
24

rule, albeit a mandatory one, not a jurisdictional prescription delineating the adjudicatory authority of courts.” *Id.*, at 1851. “Even when an employee seeks judicial relief for claims not listed in the original EEOC charge, the complaint nevertheless may encompass any discrimination like or reasonably related to the allegations of the EEOC charge.” *Freeman v. Oakland Unified Sch. Dist.*, 291 F.3d 632, 636 (9th Cir. 2002). “[A] plaintiff’s civil claims to be reasonably related to allegations in the charge to the extent that those claims are consistent with the plaintiff’s original theory of the case.” *Id.* In determining whether the exhaustion requirement has been satisfied, it is appropriate to focus on the factual allegations and “consider such factors as the alleged basis of the discrimination [or retaliation], dates of discriminatory [or retaliatory] acts specified within the charge, perpetrators of discrimination [or retaliation] named in the charge, and any locations at which discrimination [or retaliation] is alleged to have occurred.” *Id.* The language of EEOC charges are construed “with utmost liberality since they are made by those unschooled in the technicalities of formal pleading.” *B.K.B. v. Maui Police Depart.*, 276 F.3d 1091, 1100 (9th Cir. 2002).

Liberalizing the EEOC charges here, a retaliation claim could reasonably be expected to grow out of an EEOC investigation of the Plaintiff’s allegations of sex discrimination. The Personnel Action Notices were issued four days after her first report of the harassment at Haggen.

Substantive Retaliation Claims

To make a claim for retaliation under Title VII or the WLAD, “a plaintiff must show (1) involvement in a protected activity, (2) an adverse employment action and (3) a causal link between the two.” *Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000); *Milligan v. Thompson*, 110 Wash.App. 628, 42 P.3d 418, 424 (2002). The showing under Title VII and

1 WLAD are the same except for the third element – causation. For purposes of the causation
2 element, “Title VII retaliation claims require proof that the desire to retaliate was the but-for
3 cause of the challenged employment action.” *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S.
4 338 (2013). “[T]his burden on the plaintiff to establish that his or her protected activity was a
5 but-for cause of the alleged adverse action by the employer is more demanding than the
6 motivating-factor standard.” *Stilwell v. City of Williams*, 831 F.3d 1234, 1247 (9th Cir. 2016).
7 For a retaliation claim under the WLAD, “a looser standard” applies to the causation element,
8 which evaluates “whether retaliation was a ‘substantial factor’ motivating the [adverse
9 employment action].” *Knutson v. Wenatchee Sch. Dist. #246*, 188 Wn. App. 1065 (2015).

10 If a plaintiff establishes a prima facie case, then the defendant may attempt to rebut the
11 case by presenting evidence of a legitimate non-discriminatory reason for the adverse
12 employment action. *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994);
13 *Estevez v. Faculty Club of Univ. of Washington*, 129 Wash. App. 774, 797-798 (2005). If the
14 defendant carries its burden, the burden then shifts back to the plaintiff, who can attempt to prove
15 that the employer’s reason is pretextual. *Vasquez v. Co. of Los Angeles*, 349 F.3d 634 (9th Cir.
16 2003). *Estevez*, at 798. “Once evidence supporting a prima facie case, a non-discriminatory
17 explanation, and pretext has been presented and the record contains reasonable but competing
18 inferences of both discrimination and nondiscrimination, it is the jury’s task to choose between
19 such inferences.” *Estevez*, at 798.

20 1. Prima Facie Case - Protected Activity

21 The Plaintiff’s October 16, 2017 complaint constitutes a protected activity. Plaintiff met
22 the first element of the prima facie case.

23 2. Prima Facie Case - Adverse Employment Activity

1 The Plaintiff has failed to point to issues of fact as to whether Defendant took an adverse
2 employment action against her. After the Plaintiff reported Mr. Shaffer's conduct to Ms. Hett,
3 she received two Personnel Action Notices, or "documented verbal warnings" on October 20,
4 2017. One was for her failure to turn on the soup pots on October 7 and October 15 and the
5 other was for excessive absenteeism for being absent on July 30, August 12, August 26 (for her
6 eye injury), September 25, and October 8. These notices were verbal warnings. They were not
7 adverse employment actions. There were no changes to the terms or conditions of her
8 employment; "she was not demoted, was not stripped of work responsibilities, was not handed
9 different or more burdensome work responsibilities, was not fired or suspended, was not denied
10 any raises, and was not reduced in salary or in any other benefit." *See Kortan v. California*
11 *Yourth Authority*, 217 F.3d 1104, 1113 (9th Cir. 2000); and *See Cozzi v. Cty. Of Marin*, 787 F.
12 Supp.2d 1047, 1061 (N.D. Cal. 2011). The Plaintiff has failed to point to evidence that Haggren
13 took an adverse employment action against her. This element is not met, so the Court need not
14 reach the third element, causal link between the protected activity and the adverse action.

15 3. Conclusion on the Prima Facie Case and Burden Shifting

16 The Plaintiff has failed to point to sufficient evidence on the prima facie case for
17 retaliation under either Title VII or the WLAD. The claims should be dismissed.

18 Even if she had made a prima facie case, the Defendant asserts that the two Personnel
19 Action Notices were warranted – the Plaintiff did not turn on the soup pots and she
20 acknowledges that she had too many absences. These are "legitimate non-discriminatory"
21 reasons for issuance of the Personnel Action Notices.

22 The burden then shifts back to the Plaintiff, who can attempt to prove that the employer's
23 reasons is pretextual. *Estevez*, at 798. To show pretext, Plaintiff has to provide some evidence
24

1 that the Defendant's reason for issuing the notices is “unworthy of belief.” *Brown v. City of*
2 *Tacoma*, 179 Wash. App. 1028 (2014).

3 The Plaintiff fails to carry her burden. She points out that the notice regarding the soup
4 pot incidents were issued one to two weeks after they allegedly occurred. Likewise, she notes
5 that the notice regarding her absences related to absences that occurred over a week before the
6 notice was issued; her last absence was October 8 and she did not get the notice until October 20.
7 She has not shown that a reasonable trier of fact could draw the inference that Haggen’s reasons
8 for issuing the notices were “unworthy of belief.” This claim should be dismissed.

9 **D. WASHINGTON WRONGFUL DISCHARGE CLAIM**

10 The tort of wrongful discharge in violation of public policy in Washington was adopted
11 as a narrow exception to the at-will employment doctrine. *Martin v. Gonzaga University*, 191
12 Wash.2d 712, 722-23 (2018). The tort for wrongful discharge has generally been limited to four
13 scenarios as stated in *Dicomes v. State*, 113 Wash.2d 612, 618 (1989). *Id.* Those scenarios are
14 (1) where employees are fired for refusing to commit an illegal act; (2) where
15 employees are fired for performing a public duty or obligation, such as serving
16 jury duty; (3) where employees are fired for exercising a legal right or privilege,
such as filing workers’ compensation claims; and (4) where employees are fired
in retaliation for reporting employer misconduct, i.e., whistle-blowing.

17 *Martin*, at 723 (citing *Gardner v. Loomis Armored, Inc.*, 128 Wash.2d 931, 936 (1996); *Dicomes*
18 *v. State*, 113 Wash.2d 612, 618 (1989)). Only when the facts of a claimed wrongful discharge
19 suit “do not fit neatly into” one of the *Dicomes* categories, do Washington courts look to the
20 Perritt test (as announced in *Gardner*) for guidance. *Karstetter v. King Cty. Corr. Guild*, 95531-
21 0, 2019 WL 3227311, at *6 n.7 (Wash. July 18, 2019). The Perritt test does not apply here. The
22 Plaintiff asserts that she was discharged in violation of public policy because she filed a worker’s
23 compensation claim and because she reported Mr. Shaffer’s sexually harassing conduct, both of
24

1 which were the “exercise[e of] a legal right or privilege.” Accordingly, the Plaintiff meets “her
2 burden to allege facts that fall directly within the realm of wrongful discharge, the four-part
3 Perritt framework is unnecessary.” *Id.*

4 To prevail on a wrongful discharge claim, here, the plaintiff “employee must demonstrate
5 that his or her discharge may have been motivated by reasons that contravene a clear mandate of
6 public policy.” *Martin*, at 723 (*internal quotation marks and citations omitted*). If the Plaintiff
7 succeeds, “the burden shifts to the employer to prove that the dismissal was for reasons other
8 than those alleged by the employee.” *Id.*

9 The Defendant properly points out that the Plaintiff quit, she was not discharged. “A
10 cause of action for wrongful discharge in violation of public policy may be based on ‘either
11 express or constructive’ discharge.” *Peiffer v. Pro-Cut Concrete Cutting & Breaking Inc.*, 431
12 P.3d 1018, 1031 (Wash. Ct. App. 2018)(*review denied*, 193 Wn.2d 1006, 438 P.3d 115 (2019)).
13 In reviewing claims for constructive wrongful discharge in violation of public policy,
14 Washington courts separately examine the elements for constructive discharge and then wrongful
15 discharge in violation of public policy. *Id.* If a plaintiff cannot show that she was constructively
16 discharged, their claim for wrongful constructive discharge should be dismissed. *See Peiffer*, at
17 830 (all four elements of a constructive discharge claim must be met for a claim of wrongful
18 constructive discharge).

19 “The elements of a claim of constructive discharge are that (1) the employer deliberately
20 made working conditions intolerable, (2) a reasonable person in the employee’s position would
21 be forced to resign, (3) the employee resigned because of the intolerable condition and not for
22 any other reason, and (4) the employee suffered damages as a result of being forced to resign.”
23 *Peiffer*, at 1031.

1 The Plaintiff's claim for wrongful discharge should be dismissed. The Plaintiff has failed
2 to point to sufficient evidence that she was constructively discharged. She has not shown that
3 Hagen "deliberately made working conditions intolerable." Further, she makes no showing that
4 "a reasonable person in the employee's position would be forced to resign." "Where a plaintiff
5 fails to demonstrate the severe or pervasive harassment necessary to support a hostile work
6 environment claim, it will be impossible for her to meet the higher standard of constructive
7 discharge: conditions so intolerable that a reasonable person would leave the job." *Brooks v.*
8 *City of San Mateo*, 229 F.3d 917, 930 (9th Cir. 2000). The Plaintiff failed to show that Mr.
9 Shaffer's conduct was "severe or pervasive" enough to support a hostile work environment
10 claim; she fails to demonstrate that the conditions were so intolerable that a reasonable person
11 would quit. Her claim for wrongful discharge in violation of public policy should be dismissed
12 because she has failed to point to issues of fact, which if believed, would support a constructive
13 discharge claim. *See Peiffer*, at 830.

14 **E. WASHINGTON CLAIM SUPPRESSION CLAIM**

15 The Plaintiff asserts a claim for "claim suppression" based on her receipt of a Personnel
16 Action Notice around the same time she filed a worker's compensation claim in September of
17 2017. The Defendant moves for summary judgment on this claim.

18 Under Washington's worker's compensation statute, the Industrial Insurance Act (IIA),
19 provides, in relevant part,

20 No employer may discharge or in any manner discriminate against any employee
21 because such employee has filed or communicated to the employer an intent to
22 file a claim for compensation or exercises any rights provided under this title.
23 However, nothing in this section prevents an employer from taking any action
24 against a worker for other reasons including, but not limited to, the worker's
failure to observe health or safety standards adopted by the employer, or the
frequency or nature of the worker's job-related accidents.

1 RCW 51.48.025 (1).

2 The Plaintiff's claim for worker's compensation claim suppression should be dismissed.
3 The statute specifically excludes corrective action (like the Personnel Action Notice) issued by
4 Haggen related to Plaintiff's conduct which resulted in her eye injury from grounds for suit. The
5 Court need not reach the Defendant's remaining arguments as to this claim. The motion for
6 summary judgment should be granted as to the claim for claim suppression.

7 **F. PUNITIVE DAMAGES CLAIM**

8 Haggen moves for dismissal of the Plaintiff's claim for punitive damages. The Plaintiff
9 does not address this argument. The motion for summary judgment on the Plaintiff's punitive
10 damages claim should be granted.

11 Punitive damages are available for violations of Title VII. 42 U.S.C. § 1981a. The relevant
12 provision of Title VII provides,

13 A complaining party may recover punitive damages under this section against a
14 respondent (other than a government, government agency or political subdivision)
15 if the complaining party demonstrates that the respondent engaged in a
discriminatory practice or discriminatory practices with malice or with reckless
indifference to the federally protected rights of an aggrieved individual.

16 42 U.S.C. § 1981a (b)(1).

17 To the extent it is based on her federal Title VII claims, the Plaintiff's claim for punitive
18 damages should be dismissed. She has failed to point to evidence that Haggen "engaged in a
19 discriminatory practice . . . with malice or with reckless indifference" to her federally protected
20 rights.

21 Further, to the extent her punitive damages claim is based on Washington law, it should be
22 dismissed. Under Washington law, punitive damages are not available unless authorized by
23
24

1 statute. *Dailey v. N. Coast Life Ins. Co.*, 129 Wash.2d 572, 575 (1996). The WLAD does not
2 authorize punitive damages. *Id.* The claim should be dismissed.

3 **III. ORDER**

4 It is **ORDERED** that:

- 5 • The Defendant's Motion for Summary Judgment (Dkt. 49) **IS GRANTED**; and
6 • This case **IS DISMISSED**.

7 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
8 to any party appearing *pro se* at said party's last known address.

9 Dated this 1st day of August, 2019.

10 
11

12 ROBERT J. BRYAN
13 United States District Judge
14
15
16
17
18
19
20
21
22
23
24